

[*Miller v. Tennessee Valley Authority*](#), 97-ERA-2 (ALJ Oct. 7, 1997)

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U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, OH 45202

Date: October 7, 1997

Case No. 97-ERA-2

In the Matter of

GLEND K. MILLER
Complainant

v.

TENNESSEE VALLEY AUTHORITY
Respondent

APPEARANCES:

CHARLES G. WRIGHT, JR., Esq.
For the Complainant

THOMAS F. FINE, Esq.
For the Respondent

BEFORE: ROBERT L. HILLYARD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises from a complaint filed under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 and the implementing regulations of 29 C.F.R. Part 24. The employee protection provisions of the above-referenced

statute, and implementing regulations thereunder, prohibit any employer from taking any adverse employment action against an employee, relating to the employee's compensation, terms, conditions or privileges of employment, in retaliation for the employee's assistance or participation in proceedings or any other action that furthers the purposes of the environmental statutes at issue. 29 C.F.R. § 24.2(a). Additionally, the complainant brought this action under the regulations at 10 C.F.R. § 50.7, applying to licensees of the Nuclear Regulatory Commission, and 18 C.F.R. § 1316.8, applying specifically to contract provisions of the Tennessee Valley Authority (TVA).

A formal hearing in this matter was conducted on January 15 and January 16, 1997 in Chattanooga, Tennessee. Each of the parties was afforded a full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder. The findings and conclusions which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. STATEMENT OF THE CASE

The complainant, Glenda Kay Miller, filed a complaint dated January 26, 1996 and received on January 29, 1996 with the United States Department of Labor, Wage and Hour Division, Employment Standards Administration against her employer, TVA (ALJX 1).¹ The complainant alleged that she suffered acts of retaliation and discrimination after she raised concerns about the use of the Hand Geometry Security System to superiors and co-workers at TVA. She alleges that she was sent to TVA Health Services to undergo a psychological examination, deemed unfit for duty, lost her security clearance and ultimately was dismissed because of her safety complaints.

On October 4, 1996, following an investigation, the complainant was notified by Assistant District Director Carol Merchant that the Wage and Hour Division, Employment Standards Administration, determined that Ms. Miller's allegations of discrimination could not be substantiated (ALJX 2). Ms. Miller timely appealed this determination and requested that the matter be set for a formal hearing (ALJX 3). A Notice of Hearing and Prehearing Order was issued on November 27, 1996 (ALJX 6).

II. ISSUES

1. Whether the complainant engaged in protected activity;
2. Whether the respondent took adverse action against the complainant;
3. Whether the respondent was aware of the protected activity when the adverse action occurred;

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4. Whether evidence sufficient to raise the inference that protected activity was the likely reason for the adverse action was presented;
5. Whether the complainant's complaint was timely filed;

6. Whether the complainant proved that the respondent took adverse employment actions against the complainant as a result of the complainant's protected activities;
7. Whether the respondent demonstrated legitimate, non- pretextual reasons for its actions; and
8. Provided that a dual motive is found, whether the respondent established that it would have taken the same employment actions absent the complainant's protected activities.

III. STIPULATIONS

The parties stipulated to the following and I find these stipulations supported by the evidence of record (ALJX 11):

1. As of February 1995, Ms. Miller was employed by TVA as a Systems Analyst, SC-3, in Plant Operating Systems, part of Nuclear Information Planning and Projects in the Engineering and Technical Services organization in TVA's Nuclear Power Organization (TVAN).
2. Plant Operating Systems is a service organization, providing help to TVA's nuclear plants, mainly in the area of computer software installation and operation.
3. Several TVA employees worked as SC-3 Systems Analysts and all had the same job description. Ms. Miller provided technical support to the plants on the computer systems associated with the plants' security systems and frequently had to travel to the plants to work on the computer portion of the security system.
4. The Hand Geometry System was a system to control personnel access to TVA's plants which TVAN management decided to install at TVA's plants. Ms. Miller provided technical support on the computer-related aspects of installing the Hand Geometry System at Browns Ferry nuclear plant, where she worked with Security System Upgrade Project Manager Ronald K. Golub.
5. In late 1994 and early 1995, personnel at Browns Ferry discussed technical issues about the installation of the Hand Geometry System with personnel from Plant Operating Systems, including Ms. Miller, Ms. Barbara McKenna, and Mr. Nolan Henrich. In December 1994, Mr. Henrich sent a memorandum to Browns Ferry outlining some technical issues on the Hand Geometry System.

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6. On Friday, February 3, 1995, Ms. Miller was home on sick leave. During a telephone conversation, she made a remark about a gun which disturbed Ms. McKenna. Ms. McKenna reported the remark to Mr. Henrich.
7. When Ms. Miller returned to work on Monday, February 6, 1995, she made a remark to Laura Snyder, a cooperative student, that she could understand why someone would go into an office and blow everybody away. Ms. Snyder reported the remark to her supervisor, who reported the remark to Mr. Henrich.
8. Ms. Miller was sent for a medical evaluation on February 9, 1995.
9. After initial evaluation, Ms. Miller's psychological approval for security clearance for unescorted nuclear plant access was suspended and she was held off work for a full evaluation.

10. After further evaluation, Ms. Miller's psychological approval for security clearance was denied on April 18, 1995. She was approved for duty by TVA Health Services under constraints.
11. Ms. Miller appealed the denial of psychological approval and TVA's Manager of Health Services denied her appeal on July 20, 1995.
12. Ms. Miller's security clearance was finally denied on July 21, 1995.
13. Mr. Henrich issued a notice of termination to Ms. Miller on August 2, 1995, effective September 11, 1995.
14. Ms. Miller filed the present complaint on January 26, 1996. After investigation, the Wage and Hour Division issued an October 4, 1996 decision finding that the preponderance of evidence showed that the adverse actions against Ms. Miller were not motivated by protected activities. Ms. Miller appealed.
15. Ms. Miller has also filed two formal administrative discrimination complaints, one alleging sex and age discrimination and one alleging discrimination due to handicap and raising an EEO complaint. She made no allegation in either complaint that adverse actions occurred in response to activities protected by the ERA.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Timeliness

TVA argued that the complainant failed to meet the time requirements of 42 U.S.C. § 5851(b) and that therefore her claim is untimely. Section 5851(b)(1) allows a

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complainant to file an ERA claim within 180 days after discharge or other discrimination has occurred. The time period for administrative filings begins running on the date that the employee is given definite notice of the challenged employment decision, rather than the time when the effects of the decision are felt. *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *see English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988).

Adverse actions occurred on February 6, 1995 when Ms. Miller received an unfavorable service review (CX 25), on February 9, 1995 when she was referred for a psychological evaluation at TVA Health Services (RX 11), on February 14, 1995 when her psychological S1 clearance was suspended and she was withheld from duty (RX 10), on April 18, 1995 when her S1 clearance was revoked and restrictions that she not be involved in projects concerning plant or personnel safety were imposed (RX 14), July 20, 1995 when her appeal of the S1 determination was denied (RX 24), and July 21, 1995 when her unescorted nuclear access clearance was revoked (RX 25). She did not file her complaint within 180 days of any of these actions. Because the above challenged adverse actions occurred more than 180 days before the filing of Ms. Miller's complaint, any claims about these occurrences are untimely.

Subsequently, Ms. Miller was sent a notice of termination from her position as a Systems Analyst, SC-3 dated August 2, 1995, and received August 5, 1995. The termination became effective on September 11, 1995. Ms. Miller alleged that this action occurred because she voiced concerns to TVA about the compatibility of and use of the Hand Geometry System with the Integrated Security System, which could negatively affect plant safety. The complainant filed her ERA complaint on January 26, 1996, within the 180 days allotted for timely filing. Although some documents mention the filing date as February 7, 1996, the fax of her complaint is dated January 26, 1996, a letter of acknowledgment is dated January 29, 1996, and the parties stipulated that the complaint was filed on January 26, 1996 (ALJX 1; ALJX 4; ALJX 11). Thus, I find the claim based on Ms. Miller's termination timely. I do note that the underlying chain of events leading to her termination began almost one year prior to her filing of this claim in February 1995.

Background

Glenda Miller graduated from the University of Tennessee at Chattanooga with a bachelor's degree in computer science. She also holds an associate's degree in computer science from Chattanooga State (Tr. 31). She began working for TVA on July 15, 1987. She was hired as a Programmer Analyst, at level SC-1 in Plant Operating Systems (CX 12). She was promoted within Plant Operating Systems to Systems Analyst, SC-3. In September 1992, she became the project lead for the implementation of the Integrated Security System (Tr. 31-32). The Integrated Security System is a local area network of several systems linked together to work as a unit to secure the plant (Tr. 36). It replaced the previous security system. In the fall of 1994, TVA began exploring the possibility of acquiring and installing the Hand Geometry Security System (ALJX 11). The Hand Geometry System was a security device designed to read a person's handprint as a method of identification for access to restricted areas. Ms. Miller was asked to analyze the compatibility of the Hand Geometry System with TVA's Integrated Security System at Browns

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Ferry nuclear plant. Due to her workload, she informed Ronald Golub that she would be unable to assess the system until February or March 1995 (Tr. 58). During this time period, Ms. Miller was also in the process of requesting an upgrade of her classification to level SC-4 (*See* RX 30; Tr. 267).

On February 3, 1995, Ms. Miller had a conversation with Barbara McKenna, her immediate supervisor. Ms. Miller was ill and at home. Ms. McKenna asked how Ms. Miller felt. Ms. Miller relayed the uneasy feelings she experienced when she picked up a gun in the house after she heard a noise (Tr. 68-69; Tr. 365). Ms. McKenna reported the incident to her supervisor, Nolan Henrich. On February 6, 1995, Ms. Miller returned to work and conversed with a cooperative student named Laura Snyder. Ms. Miller told Ms. Snyder that she could understand how someone could come into the workplace and hurt

people (Tr. 74). Ms. Snyder recalled Ms. Miller saying "I can understand why someone would go into an office and blow everybody away" (Tr. 263). Ms. Snyder reported the incident to her mentor, who in turn informed Mr. Henrich. As a result of these two incidents, Mr. Henrich consulted with Human Resources and determined that it was appropriate to refer Ms. Miller to TVA Health Services for a Fitness for Duty evaluation on February 9, 1995. At the hearing, Ms. Miller said that these comments were made in jest (Tr. 75). Neither Ms. McKenna nor Ms. Snyder perceived Ms. Miller as joking when she made these comments (Tr. 264; Tr. 365).

Dr. Thomas Sajwaj of TVA Health Services evaluated Ms. Miller and noted elevated levels in the paranoid and histrionic personality traits (RX 15). Dr. Sajwaj explained that when examining psychological test scores, companies establish their own norms of comparison that differ from the publisher's norm sample (Tr. 450). Based on company norms, Ms. Miller's scores fell in the ninety, ninety-fifth, and ninety-third percentiles, "which means that of everybody we test on that particular test only five scores per hundred are actually more pathological" (Tr. 451). She also was examined by a psychologist of her own choosing, Dr. Thomas Pendergrass. He also found elevations in the paranoid and histrionic categories (CX 22). After his initial consultation with Ms. Miller, Dr. Sajwaj recommended revocation of Ms. Miller's S1 clearance and withdrawal from duty (RX 10). After further evaluation, he determined that she could return to work with the restrictions that she not work on projects involving plant or personnel security (CX 16). She was placed on non-work pay status. Dr. Ken Sullivan independently reviewed the information in her case and agreed with TVA's psychological assessment (RX 23). She appealed TVA's decision, but the revocation of her S1 clearance was upheld (CX 17). Due to the denial of her S1 clearance, Ms. Miller's unescorted access clearance was revoked (RX 18). TVA attempted to locate other suitable employment for the complainant matching the limitations imposed, but was unsuccessful (Tr. 240). When no work matching her restrictions was identified, Ms. Miller received a letter on August 5, 1995, notifying her of her termination, effective September 11, 1995, due to her inability to maintain a security clearance (CX 13; RX 28). She filed this claim on January 26, 1996, alleging discriminatory termination due to safety complaints (ALJX 1). Ms. Miller had not obtained employment prior to the hearing in this matter (Tr. 81).

Under the relevant TVA management structure within Plant Operating Systems, Ms. Miller's direct supervisor was Barbara McKenna. Ms. McKenna reported to Nolan

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Henrich (RX 2). Although Ms. Miller had extensive knowledge of the newly installed Integrated Security System, she was not in a supervisory position. Moreover, although Ms. Miller often worked on location at one of TVA's nuclear plants, she was not supervised by any TVA employees that worked at the plants. The medical services department of TVA does not supervise nor report to any other division of TVA.

Pursuant to Nuclear Regulatory Commission regulations, TVA has standardized procedures for determining whether an employee is fit for duty (RX 7). Important parts of the fitness for duty program are being aware of co-workers and identifying aberrant behavior. Aberrant behavior is when a person acts differently than he normally does (Tr. 370-71; RX 7). If a TVA employee observes aberrant behavior which might jeopardize safety, the employee is to report the behavior to his supervisor (RX 7). If a supervisor is not sure about someone's ability to work safely, a fitness for duty evaluation should be requested (RX 7).

There are also company standards for determining whether a TVA employee is entitled to unescorted nuclear access clearance (RX 6). To receive unescorted nuclear access clearance, an employee must receive S1 medical clearance after a psychological examination and successfully pass a background investigation. The employee must also successfully complete general employee training, fitness for duty training, and a drug and alcohol screening. Unescorted nuclear access clearance is subject to the Continual Behavioral Observation Program. This program encompasses the monitoring function of the fitness for duty program. Employees are to watch for aberrant behavior and report such behavior to supervisors. Moreover, employees are trained to detect and report behavior changes that may reflect adversely upon the individual's trustworthiness or reliability (RX 6). Unescorted nuclear access clearance may be denied or suspended for a number of reasons, including a psychological evaluation which shows that the person is a risk in terms of trustworthiness or reliability or any other information that would adversely reflect upon the reliability and trustworthiness of the individual (RX 6).

V. DISCUSSION

Following the Secretary's instruction, I will not conduct a detailed analysis of whether the complainant has established a *prima facie* case. The Deputy Secretary stated in *Creekmore v. ABB Power Sys. Energy Servs., Inc.* that "[w]here a respondent has introduced evidence to rebut a *prima facie* case of a violation of the ERA's employee protection provision, it is unnecessary to examine the question of whether the complainant established a *prima facie* case." 93-ERA-24 at 5 (Dep. Sec'y Feb. 14, 1996); accord *Yule v. Burns Int'l Sec. Serv.*, 93-ERA-12 at 3 (Sec'y May 24, 1995). When an employer presents evidence to rebut the complainant's *prima facie* case of an ERA violation, discussing whether the complainant presented a *prima facie* case is no longer useful. *Kettl v. Gulf States Utils. Co.*, 92-ERA-33 at 6 (Sec'y May 31, 1995). After a case is tried on the merits, the Administrative Law Judge must weigh all of the evidence and determine whether the complainant has proven by a preponderance of the evidence that the respondent intentionally discriminated against the complainant because of protected activities. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7, at 6 n.1 (Sec'y Mar. 4, 1996). If a complainant cannot prevail

on the ultimate question of liability, it does not matter whether he has presented a *prima facie* case. *Kettl*, 92-ERA-33 at 6. Thus, my analysis will begin with the assumption that the complainant has established a *prima facie* case and the determination that TVA has produced evidence sufficient to rebut the presumption of the *prima facie* case. The ultimate burden of persuading that the employer intentionally retaliated against the employee because of protected activity rests with the employee. *See Smith v. Esicorp, Inc.*, 93-ERA-16 (Sec'y Mar. 13, 1996). "The employer is not required to prove a nondiscriminatory reason.... It is not enough to disbelieve the employer; the factfinder must believe the employee's explanation of intentional discrimination." *Esicorp, Inc.*, 93-ERA-16 at 10.

The basis of this action is Ms. Miller's termination of employment of which she was notified on August 5, 1995. It must be determined whether TVA discharged the complainant due to her protected activity, namely voicing safety concerns about the Hand Geometry System, or whether TVA had legitimate business reasons for terminating the complainant.

The evidence establishes that Ms. Miller had concerns about the integration of the Hand Geometry System with the newly installed Integrated Security System (Tr. 42; Tr. 287). She was concerned that the systems were not compatible and that use of both of them could lead to malfunctions that would allow unauthorized persons to enter restricted areas (Tr. 42). She testified that she shared her concerns with Jim Setliffe, Sequoyah Site Security Manager; Wadine Talent, Sequoyah Plant Access Manager; Joni Johnson, Browns Ferry Systems Engineer; Gwen Nailer, Browns Ferry Manager of Plant Access; Mike Norman, Senior Instrument Engineer; Ralph Thompson, Security Manager; Ronald Golub, Project Manager at Browns Ferry; Steve Hetzel, Section Manager; Chris Kelly, Corporate Security Manager; and Nolan Henrich, Plant Operating Systems Manager (Tr. 50-52). Her department supervisor, Nolan Henrich, was aware of these concerns because she voiced them in a meeting with him (Tr. 85; Tr. 287). Mr. Henrich subsequently included some of her concerns in a letter that he prepared to Mr. Ronald Golub, but he did not attribute these concerns to Ms. Miller (RX 4).

Although the complainant alleged that TVA took adverse employment actions against her in response to her protected activity, TVA has demonstrated non-discriminatory, valid business reasons for the adverse employment actions taken. "An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations." 10 C.F.R. § 50.7(d). TVA has no burden to prove legitimate motives, but has merely a burden of production, which it has met. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981); *Dartey v. Zack Co.*, 82-ERA-2 at 5 (Sec'y Apr. 25, 1983). After a respondent meets its burden of production, the complainant must demonstrate by a preponderance of the evidence that the articulated reasons for the adverse employment actions are a mere pretext for discrimination. *Burdine*, 450 U.S. at 256.

The respondent contends that it properly discharged the complainant because she failed to meet the fitness for duty requirements, lost her S1 medical clearance, lost her unrestricted nuclear access clearance, and was forbidden from working on projects relating to plant

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or personnel safety. TVA found no suitable employment for her that complied with the imposed limitations and she was precluded from continuing in her regular position. TVA based its discharge decision on a number of factors. Barbara McKenna reported disturbing remarks that the complainant made while she was on sick leave. Ms. Miller recounted an experience where she heard a noise in her house, became frightened, grabbed a gun, and then had strange thoughts running through her head while holding the gun (Tr. 365). Ms. McKenna reported the incident to Mr. Henrich. Mr. Henrich did not take immediate action. Rather, he decided to monitor Ms. Miller when she returned to work and assess the situation at that point. Upon her return to work, she made other disturbing remarks to Laura Snyder. The two were conversing when Ms. Miller stated that she could understand how someone could go into their workplace and blow people away (Tr. 263). Ms. Snyder reported the incident to her mentor, who then reported it to Mr. Henrich. Mr. Henrich confirmed the story with Ms. Snyder before taking any action.

At this point, Mr. Henrich consulted human resources as to the appropriate action to take in the situation. James E. Boyles of human resources contacted his supervisor, talked to security, and called Health Services and Labor Relations for guidance (Tr. 233). Mr. Boyles then suggested a medical examination and called Health Services to schedule an appointment. Mr. Henrich testified that they referred Ms. Miller to Health Services because they were very concerned about her health and the safety and well-being of everyone in the workplace. On February 9, 1995, a meeting was held with Ms. Miller during which she was informed that she was being referred to Health Services for a fitness for duty evaluation.

Ms. Miller was evaluated by Dr. Thomas Sajwaj on February 10, 1995 and March 21, 1995 and by Dr. Lynn Boatwright on February 14, 1995. In an April 18, 1995 case note, Dr. Sajwaj summarized the conclusions of the evaluation in the following manner:

This material was reviewed with Drs. Boatwright, Nagle, and Duffy. Ms. Miller's chronic interpersonal difficulties, especially with individuals in positions of authority, her chronic anger, the marked discrepancy between her views of events and the views of coworkers and supervisors, her deflection of responsibility, her lack of insight into her own behavior, and her exaggerated sense of victimization raised serious concerns about reliability and trustworthiness. DENIAL of psychological approval for Ms. Miller's unescorted access was recommended. Similarly, Ms. Miller's duties with computer systems affecting safety would be especially vulnerable to any actions she might take in response to her anger and exaggerated sense of victimization. A constraint of NO DUTIES THAT AFFECT

PLANT SAFETY AND NO DUTIES THAT AFFECT PERSONNEL SAFETY was recommended. Personal counseling would be advised. (RX 15 at 14). With these constraints, TVA found no available work for Ms. Miller (Tr. 305-06; RX 27). Thus, Human Resources recommended termination (Tr. 240).

At the hearing, Dr. Sajwaj gave greater explanation about his assessment of Ms. Miller. He discussed Ms. Miller's strong quality of misperceiving the behavior of others and

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distorting her description of the behavior (Tr. 412). He noted that she had a strong sense that she was being victimized and did not accept responsibility for her behavior (Tr. 413). During his evaluation of Ms. Miller, she did not mention any safety concerns. Rather, she spoke of conflicts with her supervisor over her job classification (Tr. 428). Dr. Sajwaj testified that he was not instructed to deny Ms. Miller's S1 clearance (Tr. 427).

Dr. Thomas Pendergrass examined the complainant at her request. He noted elevations on the histrionics or hysteria scale and on the paranoia scale (Tr. 130). He stated that his findings were consistent with those of TVA Medical Services. The findings "did suggest some trends of being demanding, perfectionistic at times, self-demanding and demanding of others, mildly irritable, and could become somewhat reactive, especially if stresses go up" (Tr. 131). He found an adjustment disorder with depression and anxiety which suggests that a person may have an emotional reaction to a difficult situation with subsequent depression and nervousness that goes along with it (Tr. 131).

Although at least Mr. Henrich was aware of Ms. Miller's concerns about the Hand Geometry System, he did not consider this a factor in the decision to refer her for a fitness for duty examination or in the ultimate decision to terminate her employment (Tr. 303). Nor did he think her concerns were safety concerns (Tr. 309). Nor did Mr. Boyles of Human Resources consider her safety complaints as a basis for her termination. Ms. Miller had no knowledge that Mr. Henrich, Ms. McKenna, or anyone else in the chain of command told Dr. Sajwaj to revoke her security clearance (Tr. 115). Nor was she aware of any communication from Dr. Sajwaj to Mr. Henrich telling him to terminate her (Tr. 116).

The complainant has not shown that TVA's proffered reasons for her termination her psychological difficulties that caused revocation of her security clearance and consequently created an unavailability of suitable jobs for her was mere pretext and that in fact TVA acted with retaliatory motives. Although Ms. Miller believes that TVA conspired against her, she has not offered sufficient evidence to prove this theory. Moreover, her allegations of a conspiracy to fire her are in line with both psychologists' evaluations that Ms. Miller tends to exaggerate situations and often feels as if people are out to destroy her (*See* CX 22; RX 15). I find that TVA had valid business reasons for referring Ms. Miller to the company psychiatrist and for ultimately terminating her employment with TVA. Barbara McKenna, Laura Snyder, and Nolan Henrich were

merely following the requirements of the Fitness for Duty Program and the Continual Behavioral Observation Program. Ms. McKenna and Ms. Snyder observed aberrant behavior of Ms. Miller and therefore reported her behavior to supervisors. Moreover, Mr. Henrich complied with company policy by referring Ms. Miller for a fitness for duty examination when he questioned her ability to continue to work safely. Several TVA employees testified that TVA handled Ms. Miller's situation in accordance with company policy and procedure. TVA has produced evidence showing legitimate, nondiscriminatory reasons for its actions. It is Ms. Miller's burden to prove by a preponderance of the evidence that TVA's proffered explanation is mere pretext. Ms. Miller has failed to meet that burden. Ms. Miller offers only allegations that she was terminated because she raised safety concerns. Moreover, there is evidence that she also attributed her firing to other motives not related to safety concerns. In other complaints, Ms. Miller alleged age and sex

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discrimination and discrimination due to handicap and filing an EEO complaint. In a sworn statement taken on December 15, 1995, prior to the filing of the ERA complaint, the complainant stated that she could think of no other reason that she was fired besides her filing of an EEO complaint based on age and sex discrimination (RX 32, at 27). Moreover, when listing causes of the situation, Ms. Miller did not mention raising safety concerns as a cause (Tr. 107; RX 9). On the other hand, TVA has provided evidence and documentation from several sources that the actions taken by TVA were not discriminatory or adverse. Rather, the actions resulted from Ms. Miller's own medical problems and subsequent loss of security clearance and complied with company policy. Ms. Miller has failed to prove that TVA acted with improper motives.

I have considered the complainant's argument that TVA's motives were improper, but I find her argument unpersuasive. Ms. Miller has not shown that TVA's proffered reasons are pretextual. She has failed to show that TVA's given reasons are not the true reasons or that a discriminatory reason is the more likely motive. Thus, the complainant has failed to meet her ultimate burden of persuasion.

Moreover, the complainant has produced no direct evidence that shows the use of an illegitimate criterion in the challenged decisions. "Direct evidence means evidence showing a specific link between an improper motive and the challenged employment decision." *Carroll v. United States Dep't of Labor*, 78 F.3d 352, 357 (8th Cir. 1996). Dual motive analysis is necessary only when the complainant provides direct evidence linking adverse employment actions to protected activities. *Id.* In this case, Ms. Miller has failed to provide any direct evidence of a connection between protected activities and adverse employment actions.

However, assuming *arguendo* that TVA did act with a dual motive, under the ERA, TVA must show by clear and convincing evidence that it would have taken the same employment actions absent Ms. Miller's protected activities. *See* 42 U.S.C. §

5851(b)(3)(D); *Yule v. Burns Int'l Sec. Serv.*, 93-ERA-12 at 4 (Sec'y May 24, 1995). No precise definition of clear and convincing evidence exists, but "the courts recognize that it is a higher burden than 'preponderance of the evidence' but less than 'beyond a reasonable doubt.'" *Yule*, 93-ERA-12 at 4; see *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 n.11 (1991); *Grogan v. Garner*, 498 U.S. 279, 282 (1991).

TVA has shown through the testimony of Ms. Miller's supervisors, members of the human resources department, and Dr. Sajwaj, as well as through documentary evidence, that TVA was justified in the employment actions taken with regard to Ms. Miller. TVA has proven by clear and convincing evidence that it was Ms. Miller's aberrant behavior that necessitated a referral to the company medical facility and ultimately resulted in removal of her security clearance. Moreover, her loss of security clearance and other employment limitations necessitated her termination as an employee of TVA. TVA had a responsibility to preserve the safety of the plant and other personnel. If Ms. Miller's judgment was impaired and her reliability and trustworthiness were under question, TVA rightfully chose not to risk the safety of others. TVA's decisions were based on legitimate business concerns. TVA has met its burden of proof in showing that it would

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have taken the same employment actions absent Ms. Miller's protected activities.

TVA articulated legitimate, nondiscriminatory reasons for dismissing Ms. Miller from her position as a Systems Analyst, SC-3. I find that Ms. Miller did not prove by a preponderance of the evidence that TVA's reasons were pretextual nor that she was dismissed because she engaged in protected activities.

VI. RECOMMENDED ORDER

IT IS RECOMMENDED that the complaint filed by Glenda Kay Miller be DISMISSED.

ROBERT L. HILLYARD
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Ave., N.W., Washington, DC 20210. See 61 Fed. Reg. 19978 and 19982 (1996).

[ENDNOTES]

¹ In this decision, "ALJX" refers to the exhibits in the administrative file, "RX" refers to the Respondent's Exhibits, "CX" refers to the Complainant's Exhibits, and "Tr." refers to the transcript of the formal proceeding.